RICHARD M. ALLEN
223 EGREMONT PLAIN ROAD
EGREMONT, MA 01230

February 28, 2017

Mr. Allen may appear by phone for the conference. He should advise my courtroom deputy, Alice Cama (914-390-4077) as to the number where he may be reached.

I think it makes sense to hold the briefing schedule on the appeal in abeyance until after the conference. It may make more sense for me to entertain the procedural motion first and then have substantive briefing if I deny the motion.

SO ORDERED.

Cathy Seibel
CATHY SEIBEL, U.S.D.J.

Feb. 28, 2017

Hon. Cathy Seibel
300 Quarropas Street, Room 533
White Plains, NY 10601

Stephanie Allen, Debtor
Case No. 17-cv-01281

Dear Judge Seibel:

I'm the appellant in the captioned case. I appear pro se. Althc licensed to practice in New York, I haven't been in active pract years. I live in Massachusetts. I'm 76 years old.

I loaned money to the debtor and her husband (my son) to buy a house in Hastings. They later separated. Under the separation arrangements, the debtor got title to the house and $250,000 in cash, all of which she spent in two years and then filed in chapter 7 bankruptcy. I'm the major creditor by far.

This letter is in response to the one filed yesterday by Mr. Macreery, counsel for the chapter 7 trustee, requesting a pre-motion conference and leave to file a motion to dismiss the appeal. I object.

My appeal is of an order of the bankruptcy court denying my motion to dismiss the case as abusive pursuant to section 707(b) of the Bankruptcy Code.[1] Mr. Macreery thinks I can't appeal that order because he thinks it's interlocutory, not final, citing a 2016 case in the Eastern District and a few others. But none of the cases he cites involve a motion to dismiss under section 707(b).

While the Second Circuit hasn't ruled on that specific issue, all other courts have unanimously ruled that denial of a motion to dismiss for abuse is final,

[1] I continue to hope that at some point the trustee will explain why she did not file a motion to dismiss for abuse, why she opposed my motion to do so and why she believes I should not be able to pursue the motion on the merits.

not interlocutory, no matter by whom filed. Rather than reiterating the reasons for that here, I attach the relevant portion of Aspen Skiing Co. v. Cherrett, 523 B.R. 660 (BAP 9th Cir. 2014), which definitively discusses the cases and their rationale, and points out that the First, Third, Fourth, Fifth, Seventh, Eighth and now Ninth circuits consider denial of a section 707(b) motion to be final.

My appeal raises a serious and important Constitutional issue, namely whether, in a chapter 7 case, a court can unilaterally and without notice issue an order discharging the debtor from her debts while a motion to dismiss for abuse is pending before the same court, and then later deny that motion on the ground that the discharge has occurred. That situation raises fundamental procedural due process issues that should not be swept under the rug without evaluation on the merits.

If the court decides to hold a pre-motion conference, I ask permission to appear by telephone. In light of the request by Mr. Macreery, I also ask that the deadline for filing appellant's brief be deferred until a reasonable time after a decision on his request is made.

Sincerely,

/s/ Richard M. Allen
Richard M. Allen
413-528-2108

N3 Genera[illegible]ot[illegible]is[illegible] Hi[illegible]ana (In re Hickman), 384 B.R. 832, 836 (9th Cir. BAP 2008)(citing Sherman v. SEC (In re Sherman), 491 F.3d 948, 967 n.24 (9th Cir. 2007)(reviewing § 707(a) motion to dismiss); and Dunkley **[*666]** v. Rega Props., Ltd. (In re Rega Props., Ltd.), 894 F.2d 1136, 1137-39 (9th Cir. 1990)(reviewing § 1112(b) motion to dismiss)). But the new provisions added to § 707(b) under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005)("BAPCPA"), "manifest a congressional policy to police all Chapter 7 cases for abuse at the outset of a Chapter 7 proceeding, and . . . raise pragmatic considerations that indicate that the denial of a § 707(b) motion to dismiss is different from the denial of other motions to dismiss [e.g., Civil Rule 12(b) or § 1112(b)(1)-(4) motions]." **McDow v. Dudley, 662 F.3d 284, 288 (4th Cir. 2011)**. " Section 707(b) creates a statutory gateway based on whether the case is abusive, and an order denying that motion to dismiss as **[**11]** abusive, in effect, finally and conclusively resolves the issue. If the denial of a § 707(b) motion to dismiss cannot be appealed immediately to the district court, the Chapter 7 proceedings would have to be completed before it could be determined whether the proceedings were abusive in the first place." **Id. at 289-90** (citation omitted).

HN4 The Ninth Circuit has not yet specifically addressed the finality of orders denying motions to dismiss chapter 7 cases for abuse under § 707(b) after BAPCPA. However, the First, Third, Fourth, Fifth, Seventh and Eighth Circuits consider such orders to be final based on practicality, judicial efficiency and other pragmatic considerations. See Morse v. Rudler (In re Rudler), 576 F.3d 37, 43-44 (1st Cir. 2009)(holding that an order denying a motion to dismiss under § 707(b), "where the dispute at issue turns on a question of law," is final because delaying consideration of the legal question in such an order "may frustrate both principles of judicial economy and Congress's goal of ensuring that debtors allocate as much of their resources as possible toward repaying their debts. . . . [M]otions to dismiss for abuse under section 707(b) are subject to statutory deadlines, presumably foreclosing renewed requests for dismissal as the Chapter 7 case proceeds."); In re Christian, 804 F.2d 46, 48 (3d Cir. 1986)(determining it **[**12]** had jurisdiction to review an order denying a motion to dismiss a chapter 7 case under § 707(b), based on judicial efficiency and practicality, for, if such an order was "not now appealable the entire bankruptcy proceedings must be completed before it can be determined whether they were proper in the first place"); **McDow v. Dudley, 662 F.3d at 290** (holding that "pragmatic considerations of preserving resources for creditors in bankruptcy and promoting judicial economy weigh heavily in favor of recognizing the finality of an order denying a § 707(b) motion to dismiss"); U.S. Trustee v. Cortez (In re Cortez), 457 F.3d 448, 453-54 (5th Cir. 2006)(determining that a district court's order remanding a bankruptcy court's order denying the trustee's motion to dismiss under § 707(b) is a final order because the remand order left only ministerial tasks for the bankruptcy court); Ross-Tousey v. Neary (In re Ross-Tousey), 549 F.3d 1148, 1152-54 (7th Cir. 2008)(determining that the district court's remand order and the bankruptcy court's order denying the U.S. Trustee's motion to dismiss under § 707(b)(2) and (b)(3)(B) were final), abrogated on other grounds by Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 131 S. Ct. 716, 178 L. Ed. 2d 603 (2011); Stuart v. Koch (In re Koch), 109 F.3d 1285, 1288 (8th Cir. 1997):

> If [orders denying dismissal for substantial abuse] cannot be appealed, bankruptcy proceedings must 'be completed before it can be determined whether they were proper in the first place.' In re Christian, 804 F.2d [46,] 48 [(3rd Cir. 1986)]. Requiring trustees to complete Chapter 7 proceedings before appealing **[**13]** **[*667]** denial of their § 707(b) motions wastes debtor resources that should be used to pay creditors, and forces trustees and bankruptcy courts to expend their scarce institutional resources on abusive Chapter 7 petitioners. Thus 'the policies of judicial efficiency and finality are best served' by allowing prompt appellate review of § 707(b) denials. Zolg v. Kelly (In re Kelly), 841 F.2d at 911.

HN5 We agree with the reasoning of the circuits that have addressed the issue regarding the finality of orders denying § 707(b) motions to dismiss. If such an order is not considered final, the moving party and the debtor will have to wait until the case is completed, which "wastes debtor resources that should be used to pay creditors, and forces trustees and bankruptcy courts to expend their scarce institutional resources on abusive Chapter 7 petitioners." **McDow, 662 F.3d at 290** (quoting Koch, 109 F.3d at 1288) (internal quotation marks omitted). Moreover, postponing the appeal until the end of the bankruptcy case could result in the need to unwind various administrative actions, likely with some difficulty (e.g., having to revoke the debtor's discharge, potentially compelling creditors to disgorge distributions made by the trustee).